A

Public Prosecutor v Francis Omar ak Kaseh

B

COURT OF APPEAL (KUCHING) — CRIMINAL APPEAL NO Q-05(H)-1–01 OF 2016
TENGKU MAIMUN, BADARIAH SAHAMID AND KAMARDIN HASHIM JJCA
30 NOVEMBER 2016

C

Criminal Procedure — Appeal — Appeal against sentence — Respondent charged with murder — Respondent pleaded guilty and charged for seven years — Prosecution dissatisfied with sentence and appealed — Whether court failed to consider public interest — Whether trial judge erred in principle — Whether sentence passed by trial judge inadequate — Whether deterrent sentence should be passed — Penal Code ss 34, 302 & 460

D

The respondent originally was charged at Miri High Court with an offence of murder under s 302 of the Penal Code ('the Code') read together with s 34 of the same for causing the death of Mu Tshun Vui while committing house burglary at Lot 4870, Jalan Jati, Desa Senadin, Miri, Sarawak. The case proceeded on the original charge under s 302 of the Code, and at the end of the case the trial judge found the prosecution failed to establish a prima facie under the s 302 of the Code, but found an offence under s 460 of the Code proven. The learned judge therefore amended the charge against the respondent, where the respondent pleaded guilty to and was sentenced to seven years imprisonment. The prosecution brought the present appeal against the said decision and argued that the offence committed by the respondent was a very serious offence, and the learned judge failed to consider the offence under s 460 of the Code carry with it a maximum imprisonment term which may extend to 30 years. The prosecution submitted that the learned judge erred in law and in fact when His Lordship had failed to consider the public interest and the gravity of the offence committed by the respondent. It was further submitted that the learned judge should impose a deterrent sentence on the respondent. On the other hand, the respondent argued that the main culprit who was directly involved in the murder of the victim was one George Kalang who had absconded and was still at large. The respondent further prayed for leniency as he was a young offender and at the time of commission of the offence, he was under the influence of alcohol and was a drug abuser.

E

F

G

H

I

Held, allowing the appeal, setting aside the sentence passed by the court below and substituting thereof with a sentence of ten years imprisonment:

(1) Public interest demands the court to pass a deterrent sentence on the offender to deter likely offenders. The learned trial judge did not at all consider the public interest factor as well as the seriousness of the offence committed by the respondent. Thus, the learned trial judge had erred in principle when he did not at all consider public interest. Further, public interest always surpass mitigating factors especially in serious cases like the one at hand. In totality, the sentence passed by the learned High Court judge was manifestly inadequate, and a deterrent sentence should be passed in the situation prevalent in this case (see paras 23, 25 & 28).

[Bahasa Malaysia summary

Responden pada asalnya dituduh di Mahkamah Tinggi Miri dengan kesalahan membunuh di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama dengan s 34 Kanun kerana menyebabkan kematian Mu Tshun Vui semasa melakukan rompakan rumah di Lot 4870, Jalan Jati, Desa Senadin, Miri, Sarawak. Kes diteruskan atas tuduhan asal di bawah s 302 Kanun, dan di akhir kes hakim perbicaraan mendapati bahawa pihak pendakwaan gagal untuk membuktikan prima facie di bawah s 302 Kanun, tetapi mendapati kesalahan di bawah s 460 Kanun dibuktikan. Hakim yang bijaksana oleh itu meminda tuduhan terhadap responden, di mana responden memplid bersalah dan menjatuhkan hukuman tujuh tahun penjara. Pihak pendakwaan membawa rayuan ini terhadap keputusan tersebut dan berhujah bahawa kesalahan yang dilakukan oleh responden adalah kesalahan yang sangat serius, dan hakim yang bijaksana gagal untuk mempertimbangkan kesalahan di bawah s 460 Kanun yang membawa tempoh penjara maksimum yang mungkin dilanjutkan kepada 30 tahun. Pihak pendakwaan berhujah bahawa hakim yang bijaksana tersilap dari segi undang-undang dan fakta apabila Yang Arif gagal untuk mempertimbangkan kepentingan awam dan keseriusan kesalahan yang dilakukan oleh responden. Ia selanjutnya dihujahkan bahawa hakim yang bijaksana patut mengenakan hukuman pencegahan ke atas responden. Sebaliknya, responden berhujah bahawa pesalah utama yang secara terus terlibat dalam pembunuhan mangsa adalah seorang yang bernama George Kalang yang telah melarikan diri dan masih bebas. Responden selanjutnya memohon bagi kelonggaran kerana dia adalah pesalah muda dan pada masa melakukan kesalahan tersebut, dia di bawah pengaruh alkohol dan penagih dadah.

Diputuskan, membenarkan rayuan, mengenepikan hukuman yang dijatuhkan oleh Mahkamah Tinggi dan menggantikannya dengan hukuman sepuluh tahun penjara:

(1) Kepentingan awam menuntut mahkamah untuk menjatuhkan hukuman pencegahan ke atas pesalah untuk menghalang pesalah yang berkemungkinan. Hakim perbicaraan yang bijaksana tidak langsung mempertimbangkan faktor kepentingan awam dan juga keseriusan

kesalahan yang dilakukan oleh responden. Oleh itu, hakim perbicaraan yang bijaksana tersilap dari segi prinsip apabila beliau tidak langsung mempertimbangkan kepentingan awam. Selanjutnya, kepentingan awam selalunya mengatasi faktor pengurangan terutamanya di dalam kes-kes serius seperti kes ini. Secara keseluruhan, hukuman yang dijatuhkan oleh hakim Mahkamah Tinggi yang bijaksana adalah jelas tidak memadai, dan hukuman pencegahan patut dijatuhkan di dalam keadaan paling menonjol di dalam kes ini (lihat perenggan 23, 25 & 28).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 425–485.

Cases referred to

Kesavan a/l Baskaran v PP [2008] 6 MLJ 384; [2008] 6 CLJ 390, CA (refd)
Koay Teng Soon & Anor v PP [2000] 2 MLJ 129; [2000] 1 CLJ 677, CA (refd)
Mohamed Jusoh bin Abdullah and another v PP [1947] 1 MLJ 130; [1947] 1 LNS 73 (refd)
Muhammad Isa bin Aris & Ors v PP [2011] 5 MLJ 342; [2011] 3 CLJ 510, CA (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256; [1976] 1 LNS 102, HC (refd)
Rex v Kenneth John Ball [1951] 35 Cr App R 164, CA (refd)

Legislation referred to

Penal Code ss 34, 302, 396, 460

Appeal from: Criminal Trial No MYY-45B-1/6 of 2014 (High Court, Miri)

Zhafran Rahim Hamzah (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Shikh Rajjish Ahmad (Shikh Rajjish Ahmad) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

BACKGROUND

[1] The respondent together with one Minggu ak Belebong and another person at large, were originally charged at the Miri High Court with an offence of murder under s 302 of the Penal Code ('the Code') read together with s 34 of the same Code. They were charged for causing the death of one, Mu Tshun Vui on 4 January 2014 between 2.50am to 1.30pm while committing house burglary at Lot 4870, Jalan Jati 1, Desa Senadin, Miri, Sarawak.

[2] At the commencement of the trial, the prosecution tendered an

alternative charge to both the accused persons under s 396 of the Code, an offence of gang-robbery with murder.

[3] Minggu ak Belebong ('PW13') had pleaded guilty to the alternative charge under s 396 of the Code and was sentenced accordingly to 15 years imprisonment. On appeal by the prosecution against inadequacy of sentence, the Court of Appeal on 18 April 2016 affirmed the 15 years imprisonment and imposed additional sentence of five strokes of whipping on the PW13.

[4] The case proceeded against the respondent on the original charge under s 302 of the Code. At the end of the prosecution's case, the learned trial judge found that the prosecution had failed to establish a prima facie case under s 302, but found that an offence under s 460 of the Code had been proven. The learned trial judge therefore amended the charge against the respondent.

[5] The respondent pleaded guilty to the amended charge and was sentenced to seven years imprisonment.

[6] Dissatisfied with the sentence imposed by the learned trial judge, the prosecution lodged an appeal to this court against sentence.

THE AMENDED CHARGE

[7] The charge as amended by the learned trial judge under s 460 of the Code reads as follows:

> That you together with Minggu Anak Belebong and with another still at large, on the 4th day of January 2014 between 2.50 am to 1.30 pm, at Lot 4870, Jalan Jati 1, Desa Senadin, Miri, in the District of Miri, in the State of Sarawak in furtherance of a common intention of you all, did commit housebreaking and that one of you during the time of committing housebreaking, caused the death of one Mu Tshun Vui (M) (IC No. 940628-12-6021), and you have thereby committed an offence punishable under section 460 of the Penal Code and read together with section 34 of the same Code.

BRIEF FACTS

[8] The evidence adduced in the case for the prosecution shows that on 4 January 2014 at about 2.50am, the respondent together with PW13, Jacquelyne ak Stenny ('PW12') and another person still at large known as George Kalang went to the deceased's house by two motorcycles; a Honda Wave and a Modenas Kriss bearing registration Nos QST 5782 and QMF 5235 respectively. The house gate was unlocked. Later, the respondent, PW13 and George Kalang had gone inside the house compound while PW12 waited

across the street opposite the house. At that time, PW13 was holding a baseball bat while George Kalang was holding a screwdriver.

[9] The evidence further shows that George Kalang had then forced opened the grill door using the screwdriver and broke the house door by kicking it. When they managed to get into the house, the respondent headed to the kitchen and took a shell gas tank. He then went out from the house and waited together with PW12 who was standing near the house gate at that material time. Meanwhile, PW13 and George Kalang went upstairs and kicked the door of the room where the deceased was found sleeping. Shocked by the sound of the door kicked by George Kalang, the deceased woke up and tried to fight both of them using his bare hands while George Kalang and PW13 fought him back using the baseball bat. The deceased managed to punch PW13 in the face during the fight.

[10] The fight went on until they reached the staircase and at the end of the staircase downstairs whereby there was a glass mirror which can be seen from the outside of the house. The evidence shows that PW12 and the respondent had seen them fighting vigorously and both PW13 and George Kalang kept on hitting the deceased repeatedly using the baseball bat. The respondent went back inside the house and had tried to stop the fight but did not succeed.

[11] Evidence further shows that when the deceased became weak and unable to fight back, George Kalang had quickly gone upstairs again to search for valuable things. The deceased at that material time was helpless but still alive. PW13 kept on beating the deceased's forehead with the black gym metal bar found on the floor in the living room and poked the deceased's body with the screwdriver. At that material time, the respondent was standing near the front door of the house looking at PW13 and urging him to stop but failed. In fear that the deceased might fight back and angered by the deceased's action for punching his face, when he saw the deceased was moving slightly and half conscious, PW13 had again and again beaten the deceased on the forehead with the said black gym metal bar until the deceased had completely stopped moving. George Kalang had then gone downstairs carrying the deceased's ASUS laptop and the four of them immediately left the house, leaving the deceased lying on the staircase.

[12] Based on the evidence, at about 5.30am on the same day, both PW13 and the respondent went to a house/gas tank shop in Permyjaya and sold two gas tanks each in green and yellow colour to one Kanchan SK Anowar SK ('PW11'), a Bangladeshi for RM120, while George Kalang went back home with the deceased's ASUS laptop. Evidence further shows that the yellow colour gas tank was stolen from the deceased's house.

[13] The evidence also shows that on the 4 January 2014 at about 1pm, one of the deceased's housemates, Eden Boo Ting Xuen ('PW8') had arrived at the house together with another friend of theirs, Julius Jemat ('PW9') using a car. When they reached the house, PW8 had found that the house front gate and door grill were opened. PW8 went near the main door to take a look inside the house and instantly realised that the house was broken into when he saw the living room was in a mess and the deceased was lying on the staircase downstairs, with a pool of blood. Thereby, PW9 called the ambulance and the body was later taken to the Miri General Hospital for a post-mortem. A screwdriver and a black gym metal bar were found nearby the deceased's body.

[14] The post-mortem on the deceased was conducted on 6 January 2014 by the pathologist, Dr Jamil Dolkadir ('PW14') whereby it was found that the deceased's cause of death was due to *fracture of skull, with intracranial due to blunt head injuries*. The body was found slightly decomposed, swollen and blackening of skin neck upward and blistering peeling of skin at the upper body and upper limb. There were dried blood seen at both nostril, mouth and left ears. There were external injuries seen ie laceration of upper left forehead measuring 5.5cm long, 0.9cm wide and upper skull deep and laceration at upper left temporal area measuring 3cm long, 0.8cm wide and up to skull deep. On the central nervous system, there was some hematoma below at the skin at the left anterior temporal area. On opening up the skull, there was circular depressed fracture of skull at anterior, upper left temporal bone measuring about 1.2cm in diameter. There was also fracture of skull at the anterior, upper left temporal bone, extending to left middle fossa. The left cerebrum, corresponding to the depressed fracture above was punctured. The brain was decomposed and mixed with blood at the left cerebrum areas.

[15] On 13 January 2014, the respondent and PW13 were arrested and a few items were seized by the police.

AT THE HIGH COURT

[16] After hearing parties on sentence, the learned trial judge imposed a sentence of seven years imprisonment commencing from the date of arrest on the respondent. There was no full grounds of sentencing available. In his short ruling, the learned trial judge's order was premised on the mitigating factors, the submission by the prosecuting counsel, the antecedents and the facts and circumstances of the case, in particular that the initial common intention was merely to commit housebreaking and that the respondent was not involved at all in the murder.

THE APPEAL

[17] Before us, the learned deputy public prosecutor ('the learned DPP') submitted that the learned trial judge erred in law and in facts when His Lordship passed a sentence which is manifestly inadequate without considering the nature of the offence committed by the respondent. The learned DPP argued that the offence committed by the respondent is a very serious offence involving the death of a young innocent 19 year old student. The learned DPP further argued that the learned trial judge had failed to consider that the offence under s 460 of the Penal Code carry with it a maximum imprisonment term which may extend to 30 years.

[18] The learned DPP further submitted that the learned trial judge erred in law and in fact when His Lordship had failed to consider the public interest and the gravity of the offence committed by the respondent. It was argued that the trial judge should impose a deterrent sentence on the respondent as a lesson for him and other would be offenders.

[19] Learned counsel for the respondent on the other hand submitted that the trial judge had seriously and carefully looked into the facts of this case in passing the sentence against the respondent under the lesser charge of s 460 of the Penal Code. Learned counsel argued that the main culprit who was directly involved in the murder of the victim is George Kalang who had absconded and is still at large. Learned counsel prayed for leniency as the respondent was a young offender and at the time of commission of the offence, the respondent was under the influence of alcohol and was a drug abuser. The respondent's counsel urged upon us not to disturb the sentence imposed by the trial judge as it was in order and does not merit an appellate intervention.

OUR DECISION

[20] Section 460 of the Penal Code provides as follows:

> 460 If, at the time of committing lurking house-trespass or housebreaking, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt of any person, every person jointly concerned in committing such lurking house-trespass or housebreaking, shall be punished with imprisonment for a term which may extent to thirty years; and shall also be liable to fine.

[21] It is trite that an appellate court will not usually alter the sentence imposed by the court below unless it is shown that the court below had imposed the sentence on the wrong principles or the sentence imposed was manifestly inadequate or grossly excessive (see *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; [1976] 1 LNS 102). Imposition of a sentence is discretionary in nature except when the statute provides only one fixed

sentence. Thus in imposing an appropriate sentence, much relies on the facts and circumstances of each case (see *Mohamed Jusoh bin Abdullah and another v Public Prosecutor* [1947] 1 MLJ 130; [1947] 1 LNS 73).

[22] Public interest has always been the first and foremost consideration in deciding the appropriate sentence. This had been decided in a celebrated case of *Rex v Kenneth John Ball* [1951] 35 Cr App R 164 as below:

> In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

[23] In the case at hand, after perusing the learned trial judge's short ruling, we found that His Lordship did not at all consider the public interest factor as well as the seriousness of the offence committed by the respondent even though the respondent had played a lesser part in the commission of the offence charged. Public interest demands the court to pass a deterrent sentence on the offender to deter likely offenders. The learned trial judge, in our view erred in principle when he did not at all consider public interest. For this we refer to the ruling of the learned trial judge at pp 206–207 of the record of appeal (Vol 2) as below:

> Court: Having considered the submissions of the prosecution in respect of this sentencing of the Accused, the mitigation of the counsel for the Accused, the antecedents, and the facts and the circumstances of this case, in the particular the fact that initial commonly intention was merely to commit housebreaking. However, things and events fall out of control of all parties as result of which a person was murdered. This Court notes that the Accused is not involved at all in the murder. In the premises, this Court sentences the Accused to 7 years imprisonment commencing from the date of his arrest.

[24] We agreed with the view of Haidar Mohd Noor JCA (as he then was) in *Koay Teng Soon & Anor v Public Prosecutor* [2000] 2 MLJ 129; [2000] 1 CLJ 677 as below as regard to public interest over an interest of the respondent at

p 131 (MLJ); p 679 (CLJ):

> We then next have to consider the period of imprisonment that should be imposed. The maximum punishment under s 304 (second limb) of the Penal Code is ten years imprisonment, but we must in considering the sentence to be imposed take into account the public interest element and not merely the interests of the appellants even though they might be of young age at the time of the commission of the offence ...
>
> Sharma J in *Tan Bok Yeng v Public Prosecutor* [1972] 1 MLJ 214 in dealing with the sentence in respect of an offence of robbery involving one of the accused whose age was 20 years, stated at p 215:
>
> > The second accused was 20 years of age while the appellant was 25 years at the date of the commission of the crime. I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of the youth alone is capable of performing and producing. Law cannot, in my view, remain merely a static and a meaninglessly passive, if ornamental and an orthodox instrument of justice, ineffective in its results and application. The social needs of the times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of the punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society.

[25] We are of the view that public interest always surpass mitigating factors especially in serious cases like the one at hand. We agreed with the view emphasised by Abdul Malik Ishak JCA in *Muhammad Isa bin Aris & Ors v Public Prosecutor* [2011] 5 MLJ 342 at p 351; [2011] 3 CLJ 510 at p 520 as below:

> Public interest features prominently in sentencing an accused person. Indeed this is the approach adopted by this court in *Tan Sri Abdul Rahim bin Mohd Noor v Public Prosecutor* [2001] 3 MLJ 1 at p 4; [2001] 4 CLJ 9 at p 13, where Shaik Daud JCA had this to say:
>
> > It cannot be gainsaid that the most onerous function of any court is to decide the appropriate sentence in any criminal case. In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. In that context the interest of justice should no doubt take into account the interest of the offender. But it is often forgotten that the interest of justice must also include the interest of the community. In assessing sentence the court should balance the interest of the offender with the interest of the victim and strike a balance, not, of course forgetting that the interest of the public should be of the uppermost consideration.

[26] Learned counsel for the respondent pointed to us that the respondent had pleaded guilty once the amended charge was offered to the respondent.

From the appeal records we observed that the respondent pleaded guilty after 15 witnesses gave evidence to unfold the prosecution's case on the original charge under s 302 of the Penal Code, after the respondent opted not to plead guilty when the respondent for the first time was offered a reduced charge under s 396 of the same Code, as what was done by the co-accused, Minggu ak Belebong (PW13).

[27] On the issue of pleading guilty, we are entirely in agreement with the view expressed by Gopal Sri Ram JCA (as he then was) in *Kesavan a/l Baskaran v Public Prosecutor* [2008] 6 MLJ 384 at p 387; [2008] 6 CLJ 390 at p 394 as below:

> [7] Generally speaking, a plea of guilt is a strong mitigating circumstance operating in favour of an accused. However, there may be cases where the offence committed is so serious and the circumstances in which it was committed so heinous that a plea of guilt need be given little or no weight. The need to protect the public is another factor that may prevail over a plea of guilt. In this context we find it sufficient to refer to the decision of the Criminal Division of the English Court of Appeal in *R v Costen* (1989) 11 Cr App R (S) 182 at p 184 where Lord Lane LCJ said:
>
> > But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence, should be passed in order to protect the public, in those circumstances a plea of guilty may not result in any discount.

[28] After considering all the circumstances of this case and having guided by the above principles, we are of the view that the sentence passed by the learned High Court judge was manifestly inadequate that requires our intervention. A deterrent sentence should be passed in the situation prevalent in this case. Accordingly, we allowed the appeal and we set aside the sentence passed by the court below and substituted thereof with a sentence of ten years imprisonment. The term of imprisonment is to run from the date of arrest.

Appeal allowed; sentence passed by court below set aside and substituted thereof with sentence of ten years imprisonment.

Reported by Mukesh Balakrishnan